SUPREME COURT, U. S.

In the Supreme Court of the United States

No. A-246

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

A. R. HENDERSON, A/K/A BOBBY HENDERSON
Defendant-Appellant

PETITION FOR WRIT OF CERTIORARI

LARKIN, HOFFMAN, DALY AND LINDGREN, LTD.
BY D. KENNETH LINDGREN
JAMES P. LARKIN
ROBERT J. HENNESSEY
724 Farmers and Mechanics Bank Building
Minneapolis, Minnesota 55402
Telephone: 335-6591
Attorneys for Defendant-Appellant

333-3539 Hayward Legal Publishing Co., Div. of Typographic Arts Inc. 333-3539

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, A. R. Henderson, hereby petitions for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals affirming his conviction on two counts of securities fraud under *15 U.S.C.* §77q (a) and on two counts of mail fraud under *18 U.S.C.* §1341.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as a slip opinion United States of America, A. R. Henderson, a/k/a Bobby Henderson, No. 20,541 (8th Cir. August 4, 1971). That opinion is appended hereto as Appendix A.

JURISDICTION

The decision sought to be reviewed was made and entered on August 4, 1971. A Motion for Rehearing was not filed because petitioner erroneously believed that such a Motion could be made within 30 days of the decision, when in fact it must be filed within 14 days. The reasons for petitioner's failure to file timely a motion for rehearing are set out in his Application for Extension of Time Within Which To File A Petition For Writ Of Certiorari previously filed with this Court. On August 31, 1971, Mr. Justice Blackmun of this Court granted an Order extending the time for filing Petition for Writ of Certiorari up to and including October 2, 1971. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is *28 U.S.C.* §1254(1).

QUESTION PRESENTED FOR REVIEW

In a trial where a common scheme is alleged to exist, are all of the acts and declarations of each of the alleged participants in the scheme admissible as evidence against all of the other alleged participants regardless of when those acts and declarations were performed or for what purpose?

STATEMENT OF CASE

The petitioner was indicted upon charges that he, along with several other defendants, engaged in a scheme to defraud investors by the sale of worthless securities. Specifically the indictment alleged violations of the anti fraud provisions of the Securities Act of 1933, *15 U.S.C.* §77q (a) and the mail fraud statute *18 U.S.C.* §1341. In addition, the

defendant was charged with conspiracy to violate all of the aforementioned statutes under *18 U.S.C.* §371. The petitioner was convicted on two counts of securities fraud and on two counts of mail fraud. He was acquitted on the conspiracy count.

The charges in the indictment arose out of the sale of promissory notes in connection with the operation of Shoppers Charge Plan, Inc. (hereinafter referred to as "Shoppers Charge"). The government alleged that the petitioner acting in concert with defendants John A. O. Swaving and Emil Dombowsky, offered and sold promissory notes to the general public when they knew that the company was bankrupt and had no means of honoring the notes.

Although Dombowsky, the man who formed Shoppers Charge and acted as its President throughout its existence, was named in the indictment and was in fact the central figure of the trial, he did not actually stand trial due to the fact that he had fled the country. Notwithstanding Dombowsky's absence almost all of the evidence introduced by the government dealt with his activities in selling the notes and running the company. The introduction of this evidence as to Dombowsky's acts and declarations was objected to as constituting inadmissible hearsay, but each objection was overruled. The evidence was admitted under the "co-conspirator" exception to the hearsay rule.

Among the hearsay statements introduced was Dombowsky's admission of guilt. Lloyd W. Hansen, a government witness testified that he confronted Dombowsky and that Dombowsky admitted that he had embezzled funds from Shoppers Charge and had defrauded investors (R. 154-155). This alleged admission was made in February of 1968, over a year after the evidence showed that the alleged scheme had ended.

In addition to Dombowsky's admission, the District Court allowed the same government witness to testify about a conversation with defendant Swaving where Swaving allegedly said "that, while he was crooked, he was too smart to be caught; that his name would not be found on any legal documents and that there wasn't any evidence that anyone would get against him" (R. 159). This statement too was made in 1968.

The only instruction the court gave in relation to the above-mentioned statements was at the close of the trial to the effect that the evidence relating to acts and declarations of conspirators did not bind the defendant until such time that there was proof that an illegal scheme to defraud existed.

On appeal, the Eighth Circuit Court of Appeals affirmed the petitioner's conviction. In affirming, the court held that all of the evidence concerning acts and declarations of Dombowsky was admissible on the grounds that as in the case of a conspiracy, where a common scheme is alleged all of the acts and declarations of each participant are admissible against all. The court imposed no limitations as to when the statements were made or for what purpose.

POINT ONE

ACTS AND DECLARATIONS OF ALLEGED PARTICIPANTS IN A SCHEME TO DEFRAUD ARE NOT ADMISSIBLE AGAINST OTHER ALLEGED PARTICIPANTS UNLESS THEY ARE MADE IN THE FURTHERANCE OF THE SCHEME AND DURING THE PENDENCY OF THE SCHEME.

The Eighth Circuit's decision in the instant case conflicts with prior decisions of this Court. The "co-conspirator ex-

cept'on" to the hearsay rule has been before this Court on numerous occasions. See *Dutton v. Evans,* 400 U.S. 74 (1971), *Lutwak v. United States,* 344 U.S. 604 (1953), *Krulewitch v. United States,* 336 U.S. 440 (1949), *Fiswick v. United States,* 329 U.S. 211 (1946). On each of these occasions this Court has clearly held that the "co-conspirator" exception only allows the admission of acts and declarations of alleged co-conspirators which are made during the pendency of the conspiracy and for the purpose of furthering the conspiracy. Other acts and declarations by an alleged participant which do not fall within this limited exception are inadmissible as against other alleged participants and cannot be used to support their conviction.

Both the District Court and the Court of Appeals failed to recognize the limited scope of the "co-conspirator" exception. In dealing with the admissibility of acts or declarations of Dombowsky and other alleged co-participants in the scheme, the two lower courts failed to make any distinction between the acts and declarations based on time and purpose. Dombowsky's admission of guilt was admitted into evidence, even though it was not made during the pendency of the scheme or in furtherance of the scheme. The record shows that Dombowsky's admission was made in February of 1968. The last overt act in the alleged scheme was the sale of notes made in July 7, 1966 (R. 1075). It is this overt act which marks the duration of the scheme. See *Fiswick v. United States, id.,* at p. 216. Furthermore, the District Court ruled that as of December, 1966, Shoppers Charge ceased to exist and that the defendants had not used the successor corporation in any way to promote the scheme (R. 334).

Not only was Dombowsky's admission objectionable because it was made after the alleged scheme had ended, but

it also was not made in furtherance of the scheme and therefore, inadmissible. As this Court indicated:

> ". . . a confession or admission by one co conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."
>
> *Fiswick v. United States, id.*, at p. 217.

Similarly, Swaving's statement that he was "crooked" should not have been admissible as against the petitioner because it too was made after the alleged scheme had ended and was not in any sense a furtherance of it.

Due to the lower court's erroneous application of the "co-conspirator exception", the jury was not given the proper cautionary instructions regarding the above-mentioned declarations. The only instruction the jury was given relative to acts and declarations of alleged co-conspirators was that they did not bind the other alleged conspirators until such time that there was proof that an illegal scheme to defraud existed. Under this instruction, the jury was allowed to consider Dombowsky's admission of guilt and Swaving's boasting as evidence against the petitioner.

The fact neither of the declarations mentioned the petitioner does not eliminate the prejudice to the petitioner. The petitioner had the constitutional right to have his guilt or innocence determined on the basis of his own acts and declarations and other legally admissible evidence, and not from acts and declarations of others.

This Court has long recognized the inherent prejudice present in conspiracy trials. Mr. Justice Jackson described the plight of a co-defendant in a conspiracy trial in *Krulewitch v. United States*, 336 U.S. 440, 445:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, a co-defendants can be prodded into accusing or contradicting each other, they convict each other."

It is because of these dangers that this Court has established the sound rule of restricting the admission of such hearsay to statements allegedly made during the pendency and in furtherance of the alleged conspiracy.

The decision of the Eighth Circuit Court of Appeals in allowing admission of hearsay testimony of alleged statements of co-defendants occurring after the alleged conspiracy is clearly in conflict with a long line of decisions made by this Court and should not be allowed to stand.

CONCLUSION

This Court should grant Certiorari and the Judgment below should be reversed.

Respectfully submitted,

LARKIN, HOFFMAN, DALY AND LINDGREN, LTD.
BY D. KENNETH LINDGREN
JAMES P. LARKIN
ROBERT J. HENNESSEY
724 Farmers and Mechanics Bank Building
Minneapolis, Minnesota 55402
Telephone: 335-6591
Attorneys for Defendant-Appellant

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 20,541

United States of America,

Appellee,

vs.

A. R. Henderson, Also Known as Bobby Henderson,

Appellant.

No. 20,546

United States of America,

Appellee,

vs.

John A. O. Swaving,

Appellant.

Appeals from the United States District Court for the District of North Dakota.

[August 4, 1971.]

Before Aldrich,* Lay and Bright, Circuit Judges.

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*Of the First Circuit, sitting by designation.

Lay, Circuit Judge.

Defendants John A. O. Swaving and A. R. Henderson, a/k/a Bobby Henderson, appeal their convictions on two counts of securities fraud under 15 U.S.C.A. § 77q(a). Henderson additionally appeals his conviction on two counts of mail fraud under 18 U.S.C.A. § 1341. The jury found Swaving innocent of the mail fraud counts and both defendants were found not guilty of a conspiracy count.[1] The alleged offenses occurred in the State of North Dakota. On appeal error is alleged as to the insufficiency of the evidence, the instructions to the jury, the admission of hearsay as to conversations and conduct of the alleged co-conspirator, one Emil J. Dombowsky,[2] and error is alleged as to the admission of documentary evidence. We affirm the judgments against both defendants.

The basic facts show that in 1963 Emil J. Dombowsky and two others incorporated Shoppers Charge Plan, Inc. (hereinafter Shoppers Charge) in North Dakota. The company issued personal credit cards which would be honored for purchases at participating stores. The corporation purchased the credit card charge slips from the stores at a six percent discount and in turn would bill and collect the full sale amount from the customer. In order to finance the

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[1]Henderson was given concurrent sentences of three years on both of the securities counts and on one of the mail fraud counts. The sentence on the other mail fraud count was suspended and he was given a three year probation to run consecutively with his three year sentence on the other counts. Swaving received a two year sentence on one security fraud count and was placed on probation for two years on the other count to run consecutive to his two year sentence.

[2]Dombowsky at the time of trial was still a fugitive, apparently having fled the country.

Shoppers Charge operation thirty day demand notes and loan deposit agreements were sold to individual investors. The notes purported to carry seven percent interest.

In late 1963 or early 1964, the sole stockholders were Dombowsky, his wife and a Russ Morrison. Defendants Henderson and Swaving became associated with Shoppers Charge in 1966.[3] Although neither owned stock, defendant Henderson assumed the title of "Business Manager" and Swaving was the "Account Executive." Both defendants were active in selling the demand notes as well as in soliciting new stores to join the credit plan. The evidence showed some $500,000 was raised by the corporation between 1963 and 1966; of that amount approximately $400,000 was raised in 1966. The defendants, like the other salesmen for the corporation, received a fifteen percent commission on all security sales besides a small salary. The evidence showed that at the time of trial Henderson had received $18,275.19 in advances; Swaving $10,555.84. According to these records Henderson was entitled to $19,183.95 in commissions while Swaving was credited with $8,210.74. Both defendants had used their "Executive" Shoppers Charge credit cards at various stores so that their balances owing were $5,282.47 for Henderson and $15,969.05 for Swaving.[4] Swaving produced a statement for

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[3]When financial difficulty of Shoppers Charge became public it was succeeded sometime in December 1966 by SCP Credit Card Corporation. Since the indictment did not mention the successor corporation all evidence was excluded which pertained to events occurring after the succession by the new corporation.

[4]Dombowsky's brother-in-law, who ran the company's operations, testified he became concerned with the increasing balances due on the defendant's credit card charge accounts. He called Dombowsky's attention to this, "but the only answer I (the brother-in-law) could get is that he would look after them. . . ."

$15,000 allegedly owed to him by the corporation for services and a receipt signed by Dombowsky for $696 which Swaving had allegedly paid on his outstanding balance.

The evidence adduced by the government showed that Henderson made sales of the demand notes to eleven persons, one brought him a security fraud count and another the mail fraud count. Swaving made several sales to the other security fraud count victim. According to a CPA's review of its financial records the corporation was at all times insolvent during its operation. The evidence is replete with instances where only isolated interest payments were made to investors. Only a few people ever received back any of their principal investment. When confronted by the officers of the successor corporation which forced him out, Dombowsky admitted his responsibility for taking and misusing "a lot of funds" but not all of it. Neither defendant took the stand.

The North Dakota Commissioner of Securities commenced an investigation of Shoppers Charge on March 14, 1966, concerning its sales of short-term promissory notes. The Commissioner determined that these notes constituted securities and that their sale without state registration was unlawful. At a May 6, 1966, meeting with the Commissioner, Dombowsky furnished what he purported to be a complete list (later found deficient) of all Shoppers Charge investors, and he promised to offer all investors a full refund with interest and to refrain from further sales until such time as the company was in compliance with North Dakota securities law. On these assurances no formal action was taken at that time by the Commissioner. However, found in the records of Shoppers Charge was a document signed by Swaving to Dombowsky, dated July 28, 1966,

as a receipt of payment for "Services rendered" with a notation, "$1,000 to be delivered to D. H. at Commissioner of Securities office." At that time Donald R. Holloway was the Deputy Securities Commissioner as an Assistant Attorney General assigned to the Securities Commission. Holloway testified that Swaving came to his office on August 23, 1966, and offered him two expensive wristwatches which Holloway refused. Later when Swaving was questioned about the $1,000 by an officer of SCP Credit Card Corp. (the successor corporation) during an audit of the books, Swaving said that it had been given him "to get the State Securities Commissioner off our back. . . ." Holloway never took anything from Swaving.

The defendants point to several factors to support their contention that they lacked the necessary criminal intent. The CPA who audited the books and records of Shoppers Charge testified that it would have taken several days of steady work to ascertain the true financial condition of the company and that only one record existed from which this could have been done. Further, it would have been "nigh unto impossible" for anyone but an expert accountant to come to the right conclusion. There is ample evidence that Dombowsky kept the books and records under lock and key, opening them to no one but a bookkeeper who was once hired to transcribe journal entries.

It is also urged that the defendants had no knowledge of the insolvency of the company, that at all times they were acting in good faith in making the misrepresentations, that Dombowsky was "a one man show," that they were unaware of any scheme, that they did not profit beyond their earned commissions and wages, and that the evidence showed they later warned investors about Dombowsky. On

the other hand, the jury weighed evidence that Swaving had a good working knowledge of the corporation records in that he displayed familiarity with the books and records during an examination after the successor corporation took over. He even at times pointed out that certain letters and instruments were missing from the files. There was testimony that Swaving boasted that while he was "crooked," he was too smart to be caught; that his name would not be found on any legal documents and that there wasn't any evidence that anybody would get against him. As mentioned above, the jury received evidence that Swaving took $1,000 from Dombowsky and attempted to bribe the Deputy Commissioner of Securities.

As to the defendant Henderson, the jury heard evidence that he managed the office during Dombowsky's absence; that he signed many business letters and securities. As business manager he dealt with several of the investors and held out that the company was in good financial condition and purchase of the notes was a "good investment." In August, 1966, in order to induce a previous investor Emil Wanner to commit an additional $5,000, Dombowsky sent Henderson to deal with him. Henderson represented that the company at that time was financially hard up and needed money. At the same time Henderson borrowed from another investor, Elmer H. Shafer, $15,000 on behalf of the corporation. The evidence showed that Henderson was fully aware of the intervention of the North Dakota Securities Commission into the corporation's activities. As discussed, Dombowsky had previously promised to comply with the Commissioner's requirements. Yet after this promise Henderson wrote a letter to one investor on August 8, 1966, indicating some knowledge of the financial condition of the

corporation as well as his willingness to operate the scheme in disregard of the state authorities.[5]

We cannot say as a matter of law that the evidence negates intent to defraud or precludes a finding that the defendants consorted with Dombowsky in a fraudulent scheme. The question presented here is one requiring factual resolution. Viewing the evidence in light most favorable

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[5]The letter reads:

"Dear Mr. & Mrs. Johnson,

"We are in receipt of your letter of August 3, 1966. Also we have a letter of similar content to one you must have recently received. The letter you received from an attorney was from our attorney, Mr. Joe Stephens. Mr. Stephens represents Shoppers Charge Plan, Inc.

"We have as of this date complied with every request made by the Securities Commissioner of North Dakota. The notes we sell do not, according to law, come under the jurisdiction of the Securities Commissioner of North Dakota. In view of the continued growth of SCP, it will be necessary in the future to sell notes which have maturity dates exceeding 12 months. In preparation of the selling of these notes, we made a full disclosure to the Securities Commissioner. They, in their abrupt and crude manner, caused some of our investors to make a similar inquiry.

"First: It is not necessary for you to answer any of the letters which you have received. Second: According to the contract you may withdraw any part or all of your money at any time. We reserve the right to withhold payment 30 days, however, as of now it has not been necessary for us to ever do so. I tried to call today but the information operator did not have a listing for Mr. Leonard O. Johnson, Mr. L. O. Johnson, or Cleo Johnson.

"Mr. Dombowsky is in California on a combination business trip and vacation and will not return until this weekend, therefore, I am pinch-hitting for him. We have now opened offices in Williston. Next will be Grand Forks and Fargo.

"I hope in some way this letter has been reassuring.

"Sincerely yours,

Bobby Henderson
Sales Manager"

to the government, we find the evidence sufficient to uphold the jury's determination that the overall circumstances sustained a finding of defendants' intent and participation in a scheme to defraud. The standards of proof surrounding intent and guilty participation have been amply discussed in recent cases and need no further amplification. See, United States v. Smallwood, No. 20,000 (8 Cir. June 14, 1971); United States v. Porter, No. 19,200 (8 Cir. April 29, 1971); United States v. Prionas, 438 F.2d 1049 (8 Cir. 1971).

Complaint is made here, as in the recent Porter case, that the jury's verdict of not guilty in the conspiracy count rules out all evidence except that relating specifically with the substantive counts charged. There is no basis to attack the verdict as inconsistent. See United States v. Porter, supra; Koolish v. United States, 340 F.2d 513 (8 Cir. 1965), cert. den. 381 U.S. 951. The evidence is undisputed that Henderson and Swaving did not join Dombowsky's activities until 1966. The conspiracy charged in the indictment allegedly was formed in 1963. Though conspirators may join an existing illegal agreement to further its illicit object, under the indictment the jury could have reasoned the conspiracy did not exist as specifically charged. An appellate court, however, need not speculate as to the reasons for the jury's findings, be they founded on some logical or illogical basis.

The jury was properly instructed that evidence relating to the acts of conspirators did not bind the defendants until such time that there was proof that an illegal scheme to defraud existed. Under the substantive counts the jury found such an illegal scheme which included the overt acts

charged. Judge Vogel's statement in Reisdoffer v. United States, 258 F.2d 379, 387 (8 Cir. 1958) is applicable here:

> "Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on. *As in the case of a conspiracy in operation the acts and declarations of each participant are admissible against all.* The record shows that the conditions on which the court permitted the testimony that would otherwise be hearsay to be considered by the jury were indicated by the court immediately through the inquiries made to the prosecutor; his replies; and the applicable laws stated; reiterated constantly for the defendants; conceded by the prosecutor; and fully explained to the jury by the court in the instructions given."[6] (Emphasis ours.)

See also, Isaacs v. United States, 301 F.2d 706, 725 (8 Cir. 1962), cert. denied 371 U.S. 818; Miller v. United States, 410 F.2d 1290, 1294 (8 Cir. 1969), cert. denied 396 U.S. 830. Once the existence of a common scheme is shown to

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[6]This Court is aware of the evidentiary problem created when conduct of alleged co-conspirators is shown to the jury on the condition that an agreement or scheme to defraud, from which the conduct derived, will be proved later on. Operation of this rule permitting the conditional admission of such evidence, it has been noted, sometimes detracts from the rule of law which requires proof of the illegal scheme or agreement itself in order to establish guilt. See 82 Harv. L. Rev. 922, 933 (1959). In the case at hand we note that a prima facie proof of the illegal scheme was established.

exist, only "slight evidence" is required to connect a particular defendant with the conspiracy. United States v. Warner, 441 F.2d 821, 830 (5 Cir. 1971). We think these principles govern the complaints made as to the evidence on the conduct of the two defendants vis-a-vis acts and admissions of Dombowsky. They likewise provide the nexus for establishing defendants' culpability on all the substantive counts, even though one or both defendants did not actually make the mailings or sales. Cf. United States v. Smallwood, supra.

Defendants further urge error concerning the court's instructions separating the evidence to be considered as to each of the respective counts. This claim must fall. Our discussion demonstrates that once the common scheme has been established all evidence relating to the scheme involving all participants is admissible.

There was sufficient evidence to refute the alleged good faith defense by the defendants. The jury could find from the evidence that the defendants had a working knowledge of the affairs of the company, that they collaborated with Dombowsky to operate a fraudulent scheme and they used the mails to lull investors into a false sense of security (see, United States v. Porter, supra). The argument that the defendants did not have knowledge of the financial plight of the company is refuted by Henderson's statements and conduct as well as by Swaving's familiarity with the books. Nevertheless, assuming arguendo that they did lack knowledge of the company's financial condition, the criminal law does not condone ignorance of facts as an excuse for reckless misrepresentations made to induce innocent victims to part with their money when the facts would require some preliminary investigation. It is well established that ignorance of inculpatory facts due to a reckless disregard is no

more a defense than ignorance of inculpatory law. In Spurr v. United States, 174 U.S. 728, 735 (1899), the Supreme Court early observed:

> "The wrongful intent is the essence of the crime. If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact."

In Baker v. United States, 115 F.2d 533, 541 (8 Cir. 1941), this Court noted, "[T]he charge that the representations were false was the legal equivalent of a charge that they were made in reckless disregard of the truth." Such irresponsibility can rise to the level of criminal conduct. Elbel v. United States, 364 F.2d 127, 134 (10 Cir. 1966), cert. den. 385 U.S. 1014 (1967); United States v. Meyer, 359 F.2d 837, 839 (7 Cir. 1966), cert. den. 385 U.S. 837; Irvin v. United States, 338 F.2d 770, 774-75 (9 Cir. 1964), cert. den. 381 U.S. 911 (1965); United States v. Benjamin, 328 F.2d 854, 862 (2 Cir. 1964); United States v. Schaefer, 299 F.2d 625, 629 (7 Cir. 1962); Stone v. United States, 113 F.2d 70, 75 (6 Cir. 1940); Slakoff v. United States, 8 F.2d 9, 10 (3 Cir. 1925).

Defendants complain as to the admissibility of the business records of the corporation. These were maintained solely by Dombowsky. The basic complaint of error is that insufficient foundation was laid to receive the records into

evidence under the Business Entry Act. 28 U.S.C.A. § 1732a. We find the case of Pulley v. United States, 253 F.2d 796 (8 Cir. 1958), apposite in answering the defendants. There, the defendant claimed that certain payroll records were erroneously admitted because no adequate foundation was laid for their admission. The records were produced by the personnel manager of the corporation who neither kept them nor supervised their making. The court said that while these factors may affect the weight of the evidence, once the records had been clearly identified by the personnel manager they were admissible under 28 U.S.C.A. § 1732a. The original Business Entry Act, 28 U.S.C.A. § 695, was enacted by Congress so as to do away with the outdated rules which gave rise to its need and at which it was aimed. Palmer v. Hoffman, 318 U.S. 109 (1942). In interpreting that same original act this Court recognized in Harper v. United States, 143 F.2d 795 (8 Cir. 1944), that the statute represented a loosening of the strict proof of authenticity which had theretofore been required. "The theory of section 1732 (28 U.S.C.A.) is to avoid the necessity of producing the person who actually participated in the transaction and then tracing through witnesses every step from payment to book entry." United States v. Re, 336 F.2d 306, 314 (2 Cir. 1964), cert. den. 379 U.S. 904; United States v. Dawson, 400 F.2d 194 (2 Cir. 1968), cert. den. 393 U.S. 1023 (1969).

The last complaint of error relates to Exhibit No. 41. It is an affidavit, admitted into evidence, of an order dated September 12, 1966, and written by the North Dakota Securities Commissioner to Shoppers Charge Corporation not to issue corporate shares in an attempt to trade them for the company's outstanding demand notes. The date on the af-

fidavit is subsequent to the dates of the substantive counts alleged. The government urges that the exhibit was properly admitted because it tended to prove criminal intent by the fact that the defendants were undertaking other illegal transactions similar to the ones charged. While it is true that the evidence need not relate directly to the specific offense charged, see, Von Feldt v. United States, 407 F.2d 95 (8 Cir. 1969), still we cannot abide by the government's claims. The affidavit was not evidence of another similar illegal transaction. It was simply evidence of the Securities Commissioner's fear that the defendants would attempt to compound the danger to investors by issuing more worthless securities. It should have been excluded.

However, we do not find that this admission of evidence constitutes reversible error. Once we agree with defendants that the affidavit did not show a separate illegal act and did not show a criminal intent as to the offenses charged, then on the basis of the overall record we view the admission as nothing more than harmless error.

Judgments affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 71-469

In the Supreme Court of the United States

OCTOBER TERM, 1971

A. B. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-469

A. R. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on two counts of securities fraud and on two counts of mail fraud, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 1341, respectively, but acquitted of conspiring to violate the same statutes in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of imprisonment for three years on both of the securities counts and on one of the mail fraud counts. Sentence on the other mail fraud count was suspended. The court of appeals affirmed (Pet. App. A).

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The essential facts are not in dispute and are set forth in the opinion of the court of appeals (Pet. App. A 2–5). They show that in 1963, one Dombowsky and two others incorporated Shoppers Charge Plan, Inc. to issue personal credit cards, purchase the credit card charge slips from participating stores, and bill cardholders accordingly. In 1966, petitioner and co-defendant Swaving became associated with Shoppers Charge (Tr. 484.) Petitioner assumed the title of "Business Manager" and Swaving was the "Account Executive." Petitioner, Swaving and Dombowsky were all active in selling demand notes, which were used to finance Shoppers Charge operations, as well as in soliciting new stores to join the credit plan. Approximately $400,000 of the $500,000 raised by the corporation between 1963 and 1966, was raised in 1966 during petitioner's association with Shoppers Charge (Tr. 825–826). The evidence showed that the corporation was at all times insolvent during its operation and that only isolated interest payments were made to investors. Only a few investors ever received back any of their principal investment.

In March 1966, the North Dakota Commissioner of Securities commenced an investigation of Shoppers Charge with respect to its sales of short-term promissory notes. The Commissioner determined that these notes constituted securities and that their sale without state registration was unlawful. The evidence showed that petitioner was fully aware of the Commissioner's investigation of Shoppers Charge and that he had knowledge of the company's financial condition. Peti-

tioner, nevertheless, represented throughout most of 1966 that the company was in good financial condition and that the purchase of its notes was a good investment. Petitioner's first sales of securities in Shoppers Charge occurred at least as early as February 1966 (Tr. 681); he continued to make sales through November 1966 (Tr. 579).

2. In December 1966, Shoppers Charge was absorbed by SCP Credit Card Corporation (Tr. 150). The Board of Directors of SCP relieved Dombowsky of his duties in February 1968 at which time Dombowsky admitted to the board that he had defrauded investors and had embezzled funds from Shoppers Charge (Tr. 154). Also in 1968, Swaving boasted to the SCP board "that, while he was crooked, he was too smart to be caught; that his name would not be found on any legal documents and that there wasn't any evidence that anybody would get against him" (Tr. 159). When evidence of this statement was introduced at trial, petitioner failed to object or request that it be limited to Swaving (Tr. 159).

Petitioner contends that since Dombowsky's and Swaving's statements were not made in the course of and in furtherance of the scheme to defraud, they should not have been admitted in evidence. Although the trial court did not limit the applicability of this testimony, it did charge the jury that if a common scheme were found, statements by coadventurers could be considered

> • • • provided such acts and statements were knowingly done and made during the continu-

> ance of such common plan and in furtherance of an object or purpose of the plan.
>
> Otherwise any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made. [Tr. 1090.]

Under the circumstances, since petitioner was not mentioned nor referred to in either statement and since the jury actually acquitted petitioner of conspiracy, the failure to exclude or limit the testimony, even if error, was harmless. Moreover, Dombowsky's statement was consistent with petitioner's defense, which asserted that Dombowsky was the true culprit (Tr. 916).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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